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JURISDICTIONAL STATEMENT

Respondent Jaclyn (Russell) Buchanan accepts the jurisdictional statement set forth in Appellant's Brief.

STATEMENT OF FACTS

Under Missouri Rule of Civil procedure 84.04(c), the Appellant is required to submit a "fair and concise statement of the facts". The Statement of Facts presented by Appellant unfairly characterizes testimony adduced at trial and omits facts necessary for the proper determination of this appeal. Since a fair, unbiased, accurate summary of the facts presented to the trial court is necessary for this Court's consideration. Pursuant to Missouri Rule of Civil Procedure 84.04(f), Respondent Jaclyn (Russell) Buchanan provides the following Statement of Facts.

A. Background.

The underlying case stems from a dissolution of marriage, in which the only issue in dispute was the mailing address of the minor child for mailing and educational purposes. (Tr. 2) Neither party requested the court to award maintenance and both parties agreed that the property settlement was fair and equitable and that they should share joint custody of the minor child. (Tr. 2, 6-9, 36-37, 44-48; Lf. 3, 12, 24) Respondent left her family in Colorado and moved to Missouri to live with Petitioner. (Tr. 10) The young couple lived together for two years in Respondent's parents' house and were married on March 15, 2002. (Tr. 5, 9, 67, 68) Approximately a week before the marriage occurred, a child was born, and Petitioner was the undisputed biological father. (Tr. 6)

B. Respondent decided to take a two-week vacation to see her parents in Colorado.

Shortly after the birth of the child, Respondent developed a mild case of postpartum depression, for which she received treatment at the hospital. (Tr. 10, 27, 50) A contributing factor to Respondent's mental stress was the

fact that she was a young mother with a newborn who was homesick for her family who lived in Colorado. (Tr. 10, 11, 40) Due to the stress she was experiencing, Respondent decided to take a two-week vacation to Colorado to be with her family. (Tr. 38) Both Petitioner and his parents were aware of this trip, and although he was not happy with the idea, Petitioner agreed that it would be a good idea for Respondent to get away for a while and be with her family. (Tr. 39) Respondent asked Petitioner to come along on the vacation, but he chose not to go. (Tr. 28, 30) Respondent's parents decided to come to Missouri and stay a few days so they could be with their daughter and newborn granddaughter on the drive back to Colorado. (Tr. 28, 39) When Respondent left for her vacation back to Colorado on September 25, 2002, she had only packed one duffle bag of clothes and "more baby stuff than anything". (Tr. 28)

C. Due to Petitioner's threats and after being served with a petition for dissolution, Respondent decided to stay in Colorado.

About three hours after Respondent arrived home in Colorado, Petitioner called and demanded that Respondent bring the minor child back to Missouri right away. (Tr. 40) Petitioner subsequently called several times that day, and his demands turned to threats of taking the child away from Respondent and having her placed in a mental institution. (Tr. 41, 49) Petitioner claims it was at that point Respondent stated she would never return to Missouri. Petitioner later testified that he was not sure what was said in the series of phone conversations that day, and admitted that Respondent merely said she might not be ready to come back in two weeks. (Tr. 12, 29) Respondent claimed that until this point, she had never stated she was not coming back to Missouri. (Tr. 43)

Even after Petitioner's threats, Respondent still desired to go back to Missouri and reconcile her marriage with Petitioner. (Tr. 43) However, after being served with a Petition for Dissolution before her two-week vacation was over, Respondent decided it was in the best interest of her child and herself to stay in Colorado and not return to such a turbulent situation in Missouri. (Tr. 53)

D. Both the Petition and Counter-Petition for Dissolution expressly asked for a joint custody arrangement.

In his Parenting Plan, Petitioner specifically asked for joint custody, and did not ask for sole custody. (Lf. 12) Respondent's Parenting Plan also requested joint custody. (Lf. 24) At trial, both parties requested joint custody, with the only point of disagreement being the mailing address of the child for mailing and educational purposes. (Tr. 2, 6, 19-21, 36-37, 44-45, 47-48) The trial court granted the request of both Petitioner and Respondent, and awarded joint custody to the parents, and established Respondent's mailing address as that of the minor child's. (Lf. 44)

Judge Czamanske, who sits in the 6th Circuit, was sitting in place of Judge Blankenship, who presides in the 39th Circuit, pursuant to an Order of the Missouri Supreme Court, dated August 1, 2003 pursuant to Art. V, Sec. 6 of the Missouri Constitution. (Lf. 42) Judge Czamanske presided over the trial. (Lf. 65) Local Rule 4.2 of the 39th Judicial Circuit provides that Associate Circuit Court Judges shall have jurisdiction to hear and determine all matters pursuant to 487.220 R.S.Mo.

E. Petitioner's post-trial motion was denied.

Petitioner filed a motion to set aside the judgment, to reconsider, and for a new trial. Petitioner asserted, inter alia, that the Supreme Court Order temporarily assigning Judge Czamanske to substitute for Judge Blankenship

was insufficient, and that a specific assignment from the presiding judge of the circuit, Judge Sweeney, was required in order for Judge Czamanske to have proper jurisdiction. (Lf. 65) Said motion was heard by Judge Blankenship and denied. (Lf. 6) Petitioner subsequently filed a Notice of Appeal. (Lf. 68)

POINTS RELIED ON

I. The trial court did not err by entering judgment, because the Honorable Judge Czamanske had proper authority and jurisdiction to hear this case, in that a Supreme Court Order pursuant to Mo. Const. Art. V, Sec. 6 transferring him from the sixth circuit to the thirty-ninth circuit was sufficient to confer proper authority and jurisdiction to preside over this case, and a specific appointment by the presiding circuit judge was not necessary, and because pursuant to 478.245.1 R.S.Mo., the 39th Circuit had enacted Local Rule 4.2 which provides that associate circuit judges may hear and determine all cases and matters pursuant to §478.220 R.S.Mo.; and in the alternative, Appellant should be estopped from appealing the Judgment, because Judge Czamanske awarded joint legal and physical custody at the request of both parties, and Respondent therefore waived his right to appeal the judgment.

II. The trial court did not erroneously apply the law by failing to make written findings in its judgment detailing the specific relevant factors set forth in § 452.375.2 R.S.Mo., because specific findings are required in the Order or Judgment only when the parties disagree on the custodial arrangement or the judge rejects a custodial arrangement jointly proposed by the parties, in that the parties in this case agreed to joint legal and physical custody and the trial court approved the same, setting forth its findings based upon the best interests of the child and the substantial evidence introduced at trial concerning the factors in § 452.375.2 R.S.Mo. implicitly in its Judgment, and explicitly in the Docket Entry dated September 18, 2003.

I. ARGUMENT

I. The trial court did not err by entering judgment, because the Honorable Judge Czamanske had proper authority and jurisdiction to hear this case, in that a Supreme Court Order pursuant to Mo. Const. Art. V, Sec. 6 transferring him from the sixth circuit to the thirty-ninth circuit was sufficient to confer proper authority and jurisdiction to preside over this case, and a specific appointment by the presiding circuit judge was not necessary, and because pursuant to 478.245.1 R.S.Mo., the 39th Circuit had enacted Local Rule 4.2 which provides that associate circuit judges may hear and determine all cases and matters pursuant to §478.220 R.S.Mo.; and in the alternative, Appellant should be estopped from appealing the Judgment, because Judge Czamanske awarded joint legal and physical custody at the request of both parties, and Respondent therefore waived his right to appeal the judgment.

A. Standard of Review

A decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is against the weight of the evidence with caution and with a firm belief that the decree or judgment is wrong. Id.

This Court affords trial courts' custody determinations greater deference than any other type of case. Spradling v. Spradling, 959 S.W.2d 908. A trial court's custody order will be reversed only if it is manifestly erroneous and the court is firmly convinced that the welfare of the child requires a different disposition. Id. The trial court is presumed to have based its custody determination on the best interests of the child after considering the credibility of the witnesses and other intangibles which it is in a superior position to judge. Id. A custody decision will not be reversed so long as there is credible evidence upon which to base the custody award. Id.

B. A judge who has been legitimately transferred by an order of the Missouri Supreme Court does not need to be specifically assigned to each particular case he/she presides over to clothe him/her with authority to hear a case that naturally comes before him/her.

This issue has been previously addressed by this Court en banc as well as the Eastern District Court of Appeals. In both instances, it was found that a specific assignment of a judge to a particular case was not necessary when an associate circuit judge was generally assigned to preside in a different circuit.

First, in Kansas City v. Rule, 673 S.W.2d 21 (Mo. banc 1984), this Court, en banc, held that a general assignment of an associate circuit judge by a presiding circuit judge was sufficient to confer proper jurisdiction upon that judge, and a specific assignment by the presiding judge was not necessary. Id. at 25. Further, this Court extensively studied and commented on the legislative intent § 478.240.2 R. S.Mo. Id. at 24. This Court opined that the powers and authority of a judge generally transferred were to be

liberally construed, so as not to restrict judicial authority, but to expand it. Id. at 25.

C. Judicial economy mandates a broad interpretation of judicial transfers.

The facts of Kansas City vary from the instant case, however the legal issues involved are directly on point. In Kansas City, a defendant in a municipal case requested a trial de novo, so the case was routinely assigned to the Associate Circuit of Jackson County pursuant to a general administrative order by then Presiding Judge Laurence R. Smith. The Western District Court of Appeals, sua sponte and before addressing the merits of the case, ruled that the associate circuit judge was without jurisdiction to hear the case because the assignment order did not name the specific judge to which the case was assigned. The Western District transferred the case to this Court, which held that the trial court did have jurisdiction, and transferred the case back to the Western District for consideration of the appeal on its merits.

The Western District's interpretation of the statute resulted from its belief that the assignment powers granted to presiding judges in § 478.240.2 R.S.Mo. should be narrowly construed. Id. at 23. Two factors prompted the court to take such a view. First, it pointed to language in the statute providing that "[such] assignment authority shall include the authority to authorize *particular* associate circuit judges to hear and determine cases or classes of cases in addition to those authorized in section 478.225."; Id. (Emphasis added.) Second, The Western District sought to justify its narrow interpretation of the statute on the basis of a legislative desire to strictly contain the jurisdiction of associate circuit judges, interpreting the

legislature's use of the word "particular" as evidencing a desire to require specific identification of each associate judge assigned to hear cases other than those mentioned in. Id.

This Court, however, did not find this reasoning persuasive, stating, " It is not clear to us what policy or purpose would be furthered by requiring a presiding judge who desires to authorize associate circuit judges in the circuit to hear certain classes of cases to mention each judge by name in the order. Id. at 23.

In support of its opinion, this Court conducted a thorough study of the legislative intent of 478.225 R.S.Mo. implementing article V, Section 6 of the Missouri Constitution, and found no basis for the conclusion that the legislature sought to narrowly limit the jurisdiction of associate circuit judges. Indeed, all indications are to the contrary. Id. at 24. This Court stated, "It makes more sense to construe the language in question as specifically authorizing a presiding judge to assign, *if he or she so chooses*, specific associate circuit judges or associate circuit divisions to hear certain cases or classes of cases." Id. (emphasis added)

This Court additionally found that both the Constitutional and statutory scheme enacted thereunder reflect a clear intent to *enlarge* the role of the associate court division in Missouri's unified court scheme in order to better utilize judicial manpower and to expedite the handling of cases. Id. at 25. In leaving the breadth of the jurisdiction of the associate circuit to the judiciary, this Court determined that the legislature may well have believed that the local circuit courts, subject to the supervision of this Court and certain statutory restrictions, can best decide what cases or classes of cases should be assigned to associate circuit judges in order to promote the efficient administration of justice in this state. Id. However, just because the

presiding judge of the circuit has the authority to specifically assign associate circuit judges to a specific case or classes of cases, does not mean that the presiding judge must exercise that authority.

Under 478.225.3 R.S.Mo., associate circuit judges may hear and determine those cases: (1) assigned to them by order of the presiding judge of the circuit under § 478.240; (2) assigned to them pursuant to local court rules under § 478.245.1; or (3) assigned to them by the Supreme Court pursuant to Article V, Section 6 of the Missouri Constitution. Kansas City at 21, 23. In the instant case Judge Czamanske had proper authority to preside over this case under subsections two and three.

It is undisputed that pursuant to an order of this Court under § 478.240.3 R.S.Mo. Judge Czamanske was properly transferred from the 6th Circuit to the 39th Circuit for the week of September 15, 2003 through September 19, 2003, but in addition to the authority under said statute, Judge Czamanske also had authority pursuant to the Local Rules of the 39th Circuit. (App. Br. 34) The version of Local Rule 4.2 that was in effect at the time this case was adjudicated references 478.220 R.S.Mo., which states in relevant part: "Circuit judges and associate circuit judges may hear and determine all cases and matters within the jurisdiction of their circuit courts[.]" *478.220 R.S.Mo.* Family law cases would fall under this designation, even though that type of case was not specifically designated, as is the case in the current version of the rule.

Appellant argues that additional actions were needed to enable Judge Czamanske to preside over this particular case. (i.e., a specific assignment by either this Court or the presiding judge of Circuit 39, Judge Sweeney) and construes the meaning and intent of the August 1, 2003 Order of this Court in a narrow fashion, as did the Western District in Kansas City v. Rule.

Kansas City at 23; (App. Br.38, 41) Appellant asserts that said Order granted Judge Czamanske the jurisdiction to hear only those cases in the 39th Circuit that were specifically assigned to him. (App. Br. 37, 41) To follow Appellant's construction in such a manner would simply be contrary to judicial economy.

Pursuant to the Supreme Court's reasoning in Kansas City, it would be impractical and unduly burdensome to require the presiding judge, Judge Sweeney, to specifically assign Judge Czamanske, by name, to preside over each routine motion, argument, hearing, trial, and other various and sundry matters that came before him each day. The plain language of this Court's Order surely granted Judge Czamanske the authority to preside over this case, and any other case that would naturally come before him as a substitute for Judge Blankenship in the 39th Circuit. However, said Order would not allow Judge Czamanske to hear cases that would naturally come before judges other than Judge Blankenship in the 39th Circuit.

The case at bar clearly falls within the confines of the grant of authority and jurisdiction granted by this Court. Following this Court's reasoning in Kansas City v. Rule, judicial assignments should be broadly construed so as to better utilize judicial manpower and to expedite the handling of cases. Kansas City at 25. Therefore, Judge Czamanske possessed the proper authority and jurisdiction to hear the case under this Court's Order temporarily transferring him to the 39th Circuit. His actions were proper and Judge Sweeney was not required to specifically assign him by name to Appellant's case. Therefore, this Court should reaffirm its reasoning in Kansas City v. Rule, in that the jurisdictional powers and authority granted by a judicial transfer Order should be broadly construed.

D. A specific assignment by Judge Sweeney was not necessary to clothe Judge Czamanske with jurisdiction and authority to hear this case.

In Lansing v. Lansing, 736 S.W.2d 554, the Eastern District held that an order from this Court assigning a trial judge to a different circuit was in and of itself sufficient to provide the authority to hear the case, without the necessity of a specific assignment to a particular case. Id. at 558. The case at bar is extremely similar both factually and legally to Lansing v. Lansing, where the husband/Appellant asserted that the judgment of dissolution should be set aside because the case was presided over by a judge who had not been specifically assigned to that case. Id. at 557. The Eastern District held that the associate circuit judge was clothed with the proper authority to hear the case merely by virtue of the Supreme Court order assigning the visiting judge to temporarily preside in that circuit. Id. at 558. Lansing clearly sets forth law that is contrary to Appellant's arguments, and the same should be adopted here.

In this case, the husband is appealing a judgment of dissolution, and asserts, inter alia, that Judge Czamanske, an associate circuit court judge who was temporarily transferred from the 6th Circuit to the 39th Circuit by an Order of this Court, did not have proper jurisdiction to hear the case because he was not specifically assigned by name to the case. (App. Br. 33) Appellant further asserts that it was the job of the presiding judge, Judge Sweeney, to specifically assign Judge Czamanske by name to Appellant's case. (App. Br. 35)

A specific assignment to hear a specific case in the 39th Circuit by Judge Sweeney was unnecessary in order for Judge Czamanske to have jurisdiction over this case; this Court's order was sufficient. Appellant

attempts to narrowly construe the subsequent language in the Order that states in relevant part, “powers and responsibilities shall be confined to designated matters and cases.” (Lf. 42) Such language was included merely to prevent Judge Czamanske from hearing any matters that would not naturally come before Judge Blankenship, whom Judge Czamanske was substituting for.

Under § 478.220, RSMo., "circuit judges and associate circuit judges may hear and determine all cases and matters within the jurisdiction of their circuit court". In re Marriage of Pierce, 867 S.W.2d 237. There is no question here that the circuit court had jurisdiction over the parties. The plain and clear language of § 478.220 R.S.Mo. gave Judge Czamanske jurisdiction to "hear and determine all cases and matters within the jurisdiction" of the Circuit Court. Id. Therefore, Judge Czamanske had proper jurisdictional authority to hear this specific case, and any other case heard during the week in which he substituted for Judge Blankenship, solely by virtue of the Supreme Court Order. Appellant’s reasoning on this issue has already been thoroughly analyzed and repeatedly rejected both by this Court en banc and the Eastern District Court of Appeals, in Kansas City and Lansing, respectively, and should be rejected once again.

E. In the alternative, Appellant should be estopped from appealing the Judgment, because the parties agreed to a joint custodial arrangement of the minor child, asked the judge to rule accordingly, and the judge did so.

A judgment entered pursuant to an agreement of the parties is not a judicial determination of rights and cannot be appealed. Cheffey v. Cheffey, 821 S.W.2d 124, 125 (Mo. App. 1991). A party is estopped or waives his

right to appeal when a judgment is entered at his request. Id. Here, both parties were in agreement as to the issue of custody, evidenced by the fact that both proposed parenting plans *explicitly* asked for joint custody. (Lf. 12, 24) Further, the parenting plan adopted in the judgment stated, "Father and Mother agree that they shall mutually exercise the joint care, custody, control and education of the minor child[.]" (LF 51) In addition, at trial, both Petitioner and Respondent testified that a shared custodial arrangement would be in the best interests of the child. (Tr. 19-21,37, 47-48) Although neither party used the words "joint custody" at trial, both parties stated their agreement to exchange the minor child every three weeks, which amounts to a joint custodial arrangement. (Tr. 19-21,37, 47-48) Therefore, since both parties implicitly and expressly asked the trial court to enter a judgment awarding joint legal and physical custody, and the same was approved, Petitioner has no right to appeal the issue of custody, and should be estopped accordingly.

II. ARGUMENT

II. The trial court did not erroneously apply the law by failing to make written findings in its judgment detailing the specific relevant factors set forth in § 452.375.2 R.S.Mo., because specific findings are required in the Order or Judgment only when the parties disagree on the custodial arrangement or the judge rejects a custodial arrangement jointly proposed by the parties, in that the parties in this case agreed to joint legal and physical custody and the trial court approved the same, setting forth its findings based upon the best interests of the child and the substantial evidence introduced at trial concerning the factors in § 452.375.2 R.S.Mo. implicitly in its Judgment, and explicitly in the Docket Entry dated September 18, 2003.

A. Standard of review.

A decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is against the weight of the evidence with caution and with a firm belief that the decree or judgment is wrong. Id.

This Court affords trial courts' custody determinations greater deference than any other type of case. Spradling v. Spradling, 959 S.W.2d

908. A trial court's custody order will be reversed only if it is manifestly erroneous and the court is firmly convinced that the welfare of the child requires a different disposition. Id. The trial court is presumed to have based its custody determination on the best interests of the child after considering the credibility of the witnesses and other intangibles which it is in a superior position to judge. Id. A custody decision will not be reversed so long as there is credible evidence upon which to base the custody award. Id.

B. A written finding in the judgment detailing the specific relevant factors of § 452.375.2 R.S.Mo. was not required because Petitioner and Respondent agreed on a custodial arrangement, namely joint physical and legal custody, and the court approved the same.

The plain language of § 452.375.6 R.S.Mo. states in relevant part, "If a proposed custodial arrangement is rejected by the court, the court shall include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement." There is no provision in the statute for primary custody, only joint or sole custody. § 452.375.1(1); Loumiet v. Loumiet, 103 S.W.3d 332, 336 (Mo. App. 2003).

The General Assembly went to great lengths to explain and delineate "custody" in said statute. *452.375.1 R.S.Mo.* In fact, the first sub-point of the statute clearly defines the various custodial arrangements. Id. "Joint physical custody means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents." Id. The custodial arrangement is the legal relationship of the parent to the child. While the designation of the child's address for mailing and educational purposes has the potential to affect the child's life, it does not change the parent's legal

rights as to that child. Appellant attempts to redefine "custodial relationship" as anything that affects a child's living circumstances.

One need not go any further than the statute itself to determine the General Assembly's intent on this issue. Section 452.375.5.1 R.S.Mo. states, *"Prior to awarding the appropriate custody arrangement* in the best interests of the child, the court shall consider each of the following as follows: Joint physical and joint legal custody . . . The residence of one of the parents shall be designated as the address of the child for mailing and educational purposes." *452.375.5.1* (emphasis added) The mailing address of the child is specifically set apart from the custodial relationship. The Legislature specifically and clearly set forth the structure of custodial arrangements, and under that structure, the child's mailing address is only a sub-point of the custodial arrangement itself. Id.

If one or both parties to a custody dispute are seeking sole custody, or a court rejects a parenting plan jointly submitted by both Petitioner and Respondent that requests joint custody, then the requisites of 452.375.6 RSMo. would be triggered and a written finding detailing the specific relevant factors of the statute would be required. *452.375.6 RSMo.* If the trial court does not adopt a certain aspect of a proposed parenting plan, that does not amount to a rejection of a custodial arrangement unless the legal rights of the parent have been diminished or extinguished altogether.

In this case, the court adopted Petitioner's and Respondent's joint request for joint custody between the parties, but denied the portion of Petitioner's parenting plan that requested his mailing address be designated as the mailing address of the minor child. (Lf. 45, 47) This does not amount to a rejection of a custodial arrangement because there was no dispute as to the joint custodial arrangement.

Simon-Harris v. Harris, 138 S.W.3d 170 illustrates this very principle. In Simon-Harris, the Southern District held that although the parties were not in agreement about the amount of parenting time each was to have with the minor child, they were in agreement that the custodial arrangement should be joint custody, and therefore written findings were not required under section 452.375.6 R.S.Mo. Id. at 178.

Appellant misconstrues the facts of Sleater v. Sleater, 42 S.W.3d 821. This case is distinguishable from the instant case in a significant way. In Sleater, both parties asked the court to incorporate into the dissolution decree their pre-dissolution custodial agreement, which stipulated to joint legal and physical custody. Id. at 823. The court did not adopt the parties' agreement, and instead granted the wife primary physical custody of the children, therefore triggering the requirements of 452.375.6 RSMo. Id. at 823. Although there has been confusion among the courts as to the labels "primary custody" and "sole custody", the two terms are commonly known to describe the same thing, however the term "sole" is now preferred. Loumiet v. Loumiet, 103 S.W.3d 332; Speer v. Colon, 155 S.W.3d at 62. Thus, in Sleater, the case was remanded in part to include the findings under 452.375.2 RSMo. into the judgment because the judge rejected the joint custodial arrangement proposed by both parties. Apart from generally illustrating certain principles of 452.375.6 R.S.Mo., the facts of Sleater are distinguishable from this case.

Appellant then attempts to use Speer v. Colon, 155 S.W.3d 60, a case recently decided by this Court, to interpret the intent of the Missouri Legislature to be that trial courts must explain their reasoning when a child's living circumstances are involved. (App. 56) There is nothing in that case to support such an assertion. In Speer, the father sought primary (sole) physical

custody in an action for modification, so under 452.375.6 R.S.Mo. the relevant statutory factors in sub-point two should have been included in the judgment because the parties did not agree on a custodial arrangement. Id. at 61. Further, in footnote eleven, Justice White, in defining "custody", employed the specific statutory language of 452.375.1 R.S.Mo., stated "'custody', means joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof." Speer at 62 This court made no attempts to interpret legislative intent in its opinion in Speer. It did, however, follow the clear statutory language of 452.375 R.S.Mo.

This Respondent, on the other hand, looks to the handiwork of the Legislature itself to determine the intent behind this law. Currently, House Bill 903 is pending, which if voted into law would amend § 452.375.6 R.S.Mo. in that a sentence would be added to the end of the subsection to read, "If the court grants sole custody to a parent under this section, the court shall make a written finding citing clear and convincing evidence based on the factors listed in subsection 2 of this section that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and the other parent should be severed." *HB 903* This proposed amendment evidences the clear intent of the Legislature that revocation of a parent's *legal relationship* to their child is what should trigger the requirement to set forth in the judgment the relevant factors in 452.375.2 R.S.Mo., not merely a denial of a subsequent detail pursuant to that legal relationship.

Appellant asserts that the details [of a custodial arrangement] are what most affect the child. (App. Br. 56) That is not true. What most affects the child is the preeminent legal right and subsequent ability of the parent to

spend time with the child and make decisions on his/her behalf. Without this legal right, the amount of parenting time, or whose mailing address is designated for educational purposes is meaningless. If one parent is granted sole physical custody, the parent/child relationship is significantly affected because the amount of parenting time will be substantially less than if joint physical custody were awarded, and may possibly snuff out that parent's right to spend any time at all with their child.

In this case, it is true that once the minor child enters kindergarten she will spend less time with her father during the school year since the mother's address was designated for educational purposes, but that is not equivalent to a denial of Father's legal right and ability to spend time with his daughter.

It is uncontroverted in this case that at all times both Petitioner and Respondent agreed that joint legal and joint physical custody of their minor child were in the best interests of the child, and the same was approved by the trial court. (Tr. 19-21, 37, 47-48) In addition, the schedule of parenting time the parties had agreed upon was adopted in the judgment; that the child be exchanged every three weeks. (Tr. 21, 36-37, 44-45; LF 54) All testimony at trial pertaining to the issues of custody and visitation were within the framework of joint custody. (Tr. 19-21, 36-37, 44-45, 47-48 Further, the parenting plan adopted by the judgment stated, "Father and Mother *agree* that they shall mutually exercise the joint care, custody, control and education of the minor child." (Emphasis added). (Lf. 51) Adopting one parent's address for the mailing and educational purposes of the child, and rejecting the other parent's address, does not constitute a rejection of a custodial arrangement, because "custody" is defined as joint legal, sole legal, joint physical, sole physical, or any combination thereof. *452.375.1 R.S.Mo.*

Therefore, since the trial court did not reject a proposed custodial arrangement, it was under no duty or obligation to set forth in its judgment an explanation of any specific factor pursuant to 452.375.2 R.S.Mo.

C. The trial court is assumed to have considered the factors in Section 452.375 R.S.Mo.

Section 452.375 is clear that the factors in subsection two merely provide a framework for deciding the overriding concern of what custodial arrangement is in the child's best interests. Spradling v. Spradling, 959 S.W.2d 908. If a trial court does not make explicit findings, the appellate court presumes that the trial court made implicit findings under said statute in accordance with the result reached. Mund v. Mund, 7 S.W.3d 401. Even when the trial court does not make specific findings, it is presumed to have considered all the evidence and made its award in the best interests of the child. Flathers v. Flathers, 948 S.W.2d 463, 471 (Mo. App. 1997).

D. Although the trial court was not required to set forth in its judgment or order an explanation of the specific relevant factors in 452.375.2 R.S.Mo. that made the custodial arrangement in the best interest of the child, it did so explicitly and implicitly.

The trial court clearly considered the factors set forth in § 452.375.2 R.S.Mo., as evidenced explicitly by both the docket entry dated September 18, 2003 and implicitly in the Judgment itself. (Lf. 43; 45) The docket entry, which is an order of the court, states, “After consideration, the Court finds the § 452.375 R.S.Mo. factors to be equal for both parents, except the interaction and interrelationships of the child with parents and others favors the mother; and further, the mother is willing to perform her functions for

the needs of the child." (Lf. 43) Thus, § 452.375.2(3) R.S.Mo. was specifically and overtly invoked in a judicial order. The Judgment and Decree of Dissolution of Marriage stated that the custodial arrangements set forth were "in the best interests of the child," which conforms to the statutory requirement and public policy of Missouri that the custodial arrangement be in the best interests of the minor child. (Lf. 45); *452.375.4 R.S.Mo.* Petitioner ignores two words in said statute: "or order", and insists that the Judgment is the only document that matters when considering whether the trial court considered the factors set forth in 452.375.2 R.S.Mo. However, according to said statute, *both* the Judgment and judicial orders must be examined and considered when determining whether the trial court erroneously applied the law. The circumstances of this case do not amount to error in any way by the trial court.

Although the trial court was not required to specifically elaborate on any factor contained in 452.375.2 R.S.Mo., substantial evidence was adduced at trial pertaining to the statutory factors of the statute, and it is clear that the trial court considered them when determining the custodial arrangement, as evidenced by both the Docket Entry and the Judgment. (Lf. 43, 44) There are express statements in the Docket Entry and Judgment that illustrate the trial court considered factors in 452.375.2 R.S.Mo. (Lf. 43, 45) Both the overt citation of said statute and explicit language that the statutory factors were "equal to both parents", as well as the Judgment which stated that custody was "in the best interests" of the minor child, leaves no doubt that the custody of the minor child was based upon the statutory factors. Id. Therefore, even though the statutory factors under 452.375. R.S.Mo. were not required be specifically elaborated upon, the court nevertheless did reference the specific factors in its docket entry and Judgment. Id.

CONCLUSION

Judge Czamanske had jurisdiction to hear this case pursuant to the Supreme Court Order, and no specific assignment by Judge Sweeney was necessary. Such specific assignments would be contrary to judicial economy. The language in said Order, "designated matters and cases", was included merely to prevent him from hearing any matters that would not naturally come before him as a substitute for Judge Blankenship. Section 478.220 R.S.Mo. and Local Rule 4.2 of the 39th Circuit give jurisdiction to associate circuit judges to hear all cases before the circuit, including dissolutions.

The trial court was not required to include specific findings under 452.375 R.S.Mo. because the parties agreed to a joint custodial arrangement. In the alternative, because both parties requested the court to enter a joint custodial arrangement, and the court did so, Appellant is estopped from appealing the issue of custody. The only issue in dispute was the mailing address of the child for educational purposes, which does not amount to a custodial dispute or rejection of a custodial arrangement. (Tr. 2); *452.375.1 R.S.Mo.* The trial court correctly applied the law and ruled accordingly with the weight of the evidence, and the judgment should be affirmed. Murphy v. Carron, 536 S.W.2d 30.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above Substitute Brief in the form specified by Rule 84.06 and one copy of the disk required by Rule 84.06(g) was mailed postage paid to Richard L. Schnake, counsel for Appellant, at Neale & Newman, L.L.P., P.O. Box 10327 Springfield, Missouri 65808 on this 13th day of May, 2005.

_____

Douglas C. Fredrick

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify:

1) That the Respondent's Brief complies with the type and volume limitations of Rule 84.06. The typeface is Times New Roman and the font is 14.

2) The signature block of the foregoing contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3) The foregoing Respondent's Brief, excluding the cover, Certificate of Service, this Certificate, and the signature block, contains 6,468 words as counted by Microsoft Word 2000.

4) The disk submitted herewith as required by Rule 84.06(g) has been scanned for viruses and is virus free.

_____

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RESPONDENT'S APPENDIX

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